

from this union. On 7 October 1986, the parties separated following acts of cruelty alleged by the petitioner and on 17 March 1987, she filed this petition seeking to end the marriage and that the three children continue to reside with the respondent's sister and that custody be granted to the respondent with reasonable access to her. She also asked that the respondent provide maintenance for her and the children of the marriage.

The petition was set down for hearing on 16 July 1987 and on that date all parties were present with their respective counsel. Mr Karam Singh who represented the respondent asked for time to file an answer and I adjourned the hearing to 23 July 1987 to enable the respondent to do so.

At the second hearing on 23 July 1987, both parties were again present, the petitioner with her counsel and the respondent with another counsel from the Legal Aid Bureau as Mr Karam Singh had discharged himself. As the respondent had not filed any answer I adjourned the hearing to 13 August 1987 to enable the respondent to do so.

At the third hearing on 13 August 1987, only the petitioner and her counsel were present. There was no sign of the respondent or his counsel and neither had he filed an answer. In his absence I had granted all the prayers asked for by the petitioner, except the prayer for maintenance and I also ordered that the decree nisi be made absolute at the end of one month.

The proceedings that followed next was the filing of the instant application by the respondent to have the decree nisi set aside and the petition reheard afresh.

The respondent's application was filed on 28 August 1987, 15 days after the decree nisi was pronounced but the application was only served on the petitioner's solicitors three months later on 23 November 1987, by which time the decree had already been made absolute. The certificate making the decree nisi absolute although filed and dated 17 September 1987 was in fact signed by the senior assistant registrar on 6 October 1987. Even at that date, the application to set aside had not been served on the petitioner's solicitors and the respondent, who is represented by solicitors, must give a good reason why it took his solicitors three months to serve the application on the petitioner's solicitors.

From his own affidavit in support of his application, the respondent has averred that his solicitors were aware on the afternoon of 13 August 1987 that the decree nisi had already been pronounced the same morning in his absence. Although his solicitors acted fast enough to file the application, they, however, dragged their feet in serving the application on the petitioner's solicitors. Since the decree nisi has already been made absolute and for all intents and purposes the parties are already di-

vorced, the respondent has to give good reasons why he had failed to file an answer.

As can be seen from the proceedings, every opportunity was given to him to file an answer. To begin with, the petition was served on him personally on 24 April 1987 and from that date until his last appearance in court on 23 July 1987, he was never denied his right to file an answer. What is more he never bothered to exercise his right to file his answer when the petition was before the court on 13 August 1987. If indeed his counsel had noted the wrong date of hearing in the file which accounted for the respondent's absence in court on 13 August 1987, this should not have prevented him or his solicitors from filing his answer. Since he did not do so, and he has not given any acceptable explanation for his tardiness, I had considered that his conduct does not justify my setting aside the decree absolute that had been regularly obtained. For him to succeed on his application, the respondent must show good and valid reasons why the decree absolute should be set aside. Since he had failed to do so, I had accordingly dismissed his application with costs.

*Order accordingly.*

Solicitors: *Syarikat Davidason; Balwant Singh Sidhu & Co.*

*Reported by Ng Sheau Jiuan*

## **Development & Commercial Bank Bhd v Syarikat Farmco Sdn Bhd & Ors**

HIGH COURT (KUANTAN) – CIVIL SUIT NO 638 OF 1985  
LAMIN J  
30 JULY 1988

*Banking – Guarantee for overdraft facilities executed after grant of overdraft – Whether consideration was past – Whether guarantee was a continuing guarantee or invalid guarantee*

*Contract – Guarantee – Guarantee for overdraft facilities executed after grant of overdraft – Whether consideration was past – Whether guarantee was a continuing guarantee or invalid guarantee*

The first defendant company had been operating an account with the plaintiff bank for overdraft facilities since 1980. A guarantee was executed by the second, third and fourth defendants (who were directors of the first defendant company) jointly and severally on 31 July 1981. Subsequently, the plaintiff bank filed a claim against the defendants for a sum of moneys due and owing by the first defendant under the account. The senior assistant registrar granted the plaintiff's application under O 14 of the Rules of the High Court 1980. The defendants appealed against the decision of the senior assistant registrar, arguing that there was delay on the part of

the plaintiff in filing his application to enter final judgment and that the consideration for the guarantee was past consideration and therefore the guarantee was not binding on the defendants.

**Held**, dismissing the appeal: (1) The delay was apparently caused by the defendants themselves in that they requested for time with the view of settling the account and serving the interest accruing. The plaintiff gave them time but the defendants unfortunately failed to honour their own proposal.

(2) By the terms of the letter of guarantee, the guarantee must be treated as a continuing guarantee because it guaranteed not only the overdraft existing at the time but also those in the future.

#### Cases referred to

- 1 *Krishnamurthy & Anor v Malayan Finance Corp Bhd* [1986] 2 MLJ 134 (refd)
- 2 *Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 (refd)
- 3 *Ram Narain v Hari Singh* AIR 1964 Raj 76 (refd)
- 4 *Perbadanan Kemajuan Negeri Selangor v Public Bank Bhd* [1980] 1 MLJ 172 (refd)
- 5 *Heng Cheng Swee v Bangkok Bank Ltd* [1976] 1 MLJ 267 (fold)

*Joseph Yeo* for the defendants/appellants.  
*Ti Lian Ker* for the plaintiff/respondent.

*Cur Adv Vult*

**Lamin J:** This is an appeal on the decision of the senior assistant registrar who granted the application (encl 5) by the plaintiff under O 14 in terms as prayed for. Briefly, the facts of this case are as follows. The first defendant company had been operating an account (account no 1429) with the plaintiff bank for overdraft facilities since 1980. By its resolution of 24 November 1980 (exh A2 to encl 5), the first defendant offered as security for those facilities, namely, a land title and a guarantee to be executed by all its four directors jointly and severally in their personal capacities. (The guarantee was duly executed on 31 July 1981 – exh 'C' to encl 5.) The plaintiff bank, on 14 November 1985, filed a claim against the defendants for the sum of \$579,521.60 being moneys due and owing by the first defendant under the said account. By the terms of the facilities granted, the defendant undertook to settle all legal charges and under this item the plaintiff made an additional claim of \$25,000 being professional fees and charges. On 24 January 1986, the defendants filed their statement of defence (encl 4). Three of its directors, namely, the second, third and fourth defendants, were sued as guarantors. On 16 April 1986, the plaintiff filed its application (encl 5) to enter final judgment.

Counsel for the defendants/appellants (the guarantors) argued that the plaintiff was not entitled to enter final judgment on two grounds, namely, that:

- (a) there was delay on the part of the plaintiff to file his application to enter final judgment, and

- A (b) the consideration in the guarantee was past consideration and therefore not valid consideration and the guarantee was accordingly not binding on the defendants.

As regards the question of delay, it was submitted that in law if there was any delay in filing the application to enter final judgment after the delivery of the statement of defence, the delay must be explained: the general principle as reiterated by the Supreme Court in the case of *Krishnamurthy & Anor v Malayan Finance Corporation Bhd*.<sup>1</sup> In this case, it may be observed that no defence was filed. In the case of *Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd*,<sup>2</sup> the application to enter final judgment was made after the filing of the defence, and the court decided that the delay of three months was not inordinate for the reasons as advanced by the plaintiff (at p 99 para 4):

- D ... and preferred the following reasons, namely, that the Department of Inland Revenue is a very large department, heavily loaded with work and shorthanded; and the situation was aggravated by the intervening Puasa hours, court vacation and festivities, namely Hari Raya Puasa, Christmas and the New Year holidays. In the light of what has been stated, I am disposed to hold that the delay of a lapse of three months in the circumstances of the case is not inordinate and does not warrant a dismissal of the application.

In the present case, the delay was apparently caused by the defendants themselves in that they requested for time with the view to settle the account and also proposed to service the interest accruing (see encl 9 – supplementary affidavit of the plaintiff, para 4). The plaintiff gave them time but the defendants unfortunately failed to honour their own proposal.

- G To support his contention for the second ground, counsel for the defendants/appellants cited the case of *Ram Narain v Hari Singh*<sup>3</sup> and quoted a passage therefrom at p 78 and for the present purpose I need only repeat the following:

H From this illustration, I feel fortified in my conclusion that anything done or any promise made for the benefit of the principal debtor must be contemporaneous to the surety's contract of guarantee in order to constitute consideration therefor. A contract of guarantee executed afterwards without any consideration is void ...

I The learned counsel further cited the case of *Perbadanan Kemajuan Negeri Selangor v Public Bank Bhd*<sup>4</sup> where the case of *Ram Narain*<sup>3</sup> was discussed. The facts relating to the case of *Perbadanan Kemajuan Negeri Selangor*<sup>4</sup> do not concern themselves with the contract of guarantee given for bank overdraft facilities. It is a case of a bank guarantee for the performance of construction works, and the ratio would have no direct application to the present case. The senior assistant registrar found support in the case of *Heng Cheng Swee v Bangkok Bank Ltd*<sup>5</sup> which dealt with

a contract of guarantee as security for bank overdraft facilities, the terms of which are almost a carbon copy of those contained in the guarantee in the present case. Some such terms, one may find, for example in cl 1 which stipulates that:

In consideration of you ... making or continuing advances or otherwise giving credit or offering banking facilities for as long as the bank may think fit and that the guarantors guarantee payment on demand ... all money ... whether certain or contingent now or hereafter owing ... on any current or other account or in any manner whatsoever ... etc.

By cl 2, it is provided that the guarantee:

... shall be a continuing security and shall extend to cover any sum or sums of money which shall for the time being constitute the balance due ...

Clause 4 provides that the guarantee 'shall be in full force and binding as a continuing guarantee'.

By cl 7, the bank may at all times and without notice 'determine, vary or increase any credit' to the customer. The Federal Court in *Heng Cheng Swee's case*<sup>5</sup> handed out two separate judgments, one by the then Lord President Tun Suffian and the other by his Lordship the Chief Justice of Borneo. The court was dealing with a letter of guarantee signed by the appellants as security for overdraft facilities given by Bangkok Bank to a company called The Malayan Timber and Granite Products Ltd. The court was unanimous in its finding which treated the guarantee as a continuing guarantee. For the purpose of disposing of the case before me, I need only recall the words of Tun Suffian in that case at p 271 para G:

... The defendant (meaning the appellant) has signed a continuing guarantee, guaranteeing the overdraft existing at the time when he signed the letter of guarantee as well as overdrafts to be made in the future.

In that case the said company, in the course of business, applied for and obtained overdrafts from the said bank on many occasions. Then the bank asked for guarantees and the defendant/appellant came to the rescue. Similarly in the present case, the first defendant company had been enjoying overdraft facilities granted by the plaintiff bank at least since September 1980 (see statement of account exhibited in encl 7) and the letter of guarantee was signed on 31 July 1981 and by its terms, it must similarly be treated as a continuing guarantee because it guaranteed not only the overdraft existing at the time but also those in the future. I therefore dismissed the appeal with costs.

*Order accordingly.*

Solicitors: Sri Ram, Zulkifly & Kumar; Ten Appaduray & Wong.

Reported by Ng Sheau Juiuan

## A MMC Marketing Sdn Bhd v Syarikat Pengangkutan Sdn Bhd

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C1449/81  
SITI NORMA YAAKOB J  
11 JULY 1988

B *Carriage by Air and Land – Common carriers – Liability for loss or injury*

*Damages – Loss of goods by carrier – Adjuster's fees for investigations paid by plaintiff – Whether recoverable from defendant*

C *Evidence – Confidential documents – Non-production at trial – Whether adverse inference should be drawn*

The defendant carried on the business of carrying goods for hire. In 1978, the plaintiff accepted the defendant's quotations for the transport of the plaintiff's tin ore concentrates purchased from mines in Perak to the smelters in Penang. Since then, the defendant had undertaken the transport of the tin ore concentrates for the plaintiff, although there was no exclusive long term agreement between the parties. Two of the defendant's lorries carrying the plaintiff's tin ore concentrates were hijacked while on the way to Penang. The plaintiff brought a claim against the defendant for the loss occasioned thereby.

E An issue which arose was whether the defendant was a common carrier or a private carrier. Another issue was whether the plaintiff had proved its claim for the price of the tin ore concentrates and the 10% premium charged on the net value of the tin ore concentrates by the adjusters engaged by the plaintiff to investigate the loss.

F Held, allowing the application: (1) The defendant was a common carrier. By its memorandum of association, they had held themselves out as carrying on the business of general carriers to transport goods for hire or reward, and by virtue of the conditions of the licences they could not refuse to carry any goods which they might be requested to carry. The permits granted by the Mines Department to the mine owners authorizing the transportation of the tin ore concentrates required the carriers to conform to the routes stated in the permits. The fact that the lorry drivers could not choose the routes to take to the smelters emphasized all the more the public nature of the defendant's business and in no way could it be said that it was a private carrier. The fact that the plaintiff was the defendant's main customer did not make the defendant anything less than a common carrier as the defendant had business dealings with other third parties in transporting rubber. The law of agency had no bearing on the case as the defendant was undoubtedly a carrier of goods for hire or reward.

H (2) A common carrier is responsible for the safety of the goods entrusted to him in all events except where loss or injury arises solely from an act of God or the fault of the consignor or inherent vice in the goods themselves, eg unruliness in the animals carried. His liability is strict as he is the insurer of the safety of the goods and he is liable if the goods are stolen by persons over whom he has no control.

I (3) The defendant's objection to the sum claimed failed as the plaintiff's witness had not been cross-examined as to how the plaintiff had arrived at the figure of \$474,740.74. The prices for the tin ore concentrates were fixed by the agreements between the plaintiff and the mine-owners. The agreements were confidential documents and their non-production at the